No. 285

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Supreme Court of the United States.

OCTOBER TERM, 1945.

HERBERT O. DUNN AND JOHN A. CADARIO,
Petitioners,

v.

TOWN OF BURLINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, MASSACHUSETTS,

AND

BRIEF IN SUPPORT THEREOF.

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Of counsel:
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Supreme Court of the United States.

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v.

TOWN OF BURLINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, MASSACHUSETTS.

To the Honorable the Justices of the Supreme Court of the United States:

The petitioners, Herbert O. Dunn and John A. Cadario, pray that a writ of certiorari may issue to review the decree of the Superior Court in and for the County of Middlesex entered June 11, 1945, in the case between the above-named parties docketed therein as No. 13195 Equity (Rec. p. 20). Said decree was entered pursuant to opinion with rescript from the Supreme Judicial Court of Massachusetts, entered May 7, 1945, docketed in said court as No. 4453 (Rec. p. 19).

Statement of Matter Involved.

The Town of Burlington brought a bill in equity to enjoin your petitioners, Herbert O. Dunn and John A. Cadario, from removing loam and topsoil from two parcels of land owned by your petitioners and located in the respondent Town of Burlington, Massachusetts (Rec. pp. 1-4). The said town stated in its bill of complaint that the removal of the loam and topsoil was a violation of the town zoning by-law in that it was a nonconforming use of land in a so-called Residence B area, as described in the town zoning by-law (Rec. pp. 3-4). The case was heard by a judge of the Superior Court of Middlesex County, who ordered a decree for the plaintiff and reported the case to the Supreme Judicial Court of Massachusetts (Rec. pp. 1, 12).

The Supreme Judicial Court sustained the trial judge and ordered a decree to be entered granting the respondent town the relief sought (Rec. p. 19).

At various appropriate stages of the proceedings in the Superior Court and in the Supreme Judicial Court your petitioners challenged the validity of the zoning by-law of the respondent town on the ground that, if it was construed to prohibit their right to remove loam and topsoil from their premises, then it was unconstitutional as in violation of the 14th Amendment to the Federal Constitution. The validity of the by-law was attacked by the pleadings (Rec. pp. 5-6), by oral argument and request to rule in the Middlesex Superior Court, and by arguments in the Supreme Judicial Court. The federal constitutional question now presented was passed upon by the Supreme Judicial Court in its opinion, pp. 600-603 in 1945 Massachusetts Advance Sheets (Rec. pp. 15-18).

A certificate of the Chief Justice of the Supreme Judicial Court of Massachusetts, the original of which is on

file with the Clerk of the Supreme Court of the United States, indicating that the federal question of due process was argued before and determined by that court, is as follows:

"SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

Middlesex, ss: No. 4453
In Equity

TOWN OF BURLINGTON
vs.
HERBERT O. DUNN and JOHN A. CADARIO

CERTIFICATE OF THE CHIEF JUSTICE AS TO CONSTITUTIONAL QUESTION ARGUED AND DETERMINED

I, Fred T. Field, Chief Justice of the Supreme Judicial Court of Massachusetts, hereby certify that at the argument of the above-entitled case the defendants presented to this Court the question of the constitutionality of the zoning by-law of the Town of Burlington in so far as it prohibited loam removal. In support of this contention that such a by-law was unconstitutional cases decided under the due process clause of the federal Constitution were relied on. *Pennsylvania Coal Co.* vs. *Mahon,* 260 U. S. 393 was one of these cases. In the opinion of the Supreme Judicial Court of Massachusetts, reported at pages 597-604 of the 1945 Massachusetts Advance Sheets, we pointed out that in our opinion the case of *Pennsylvania Coal Co.* vs. *Mahon,* 260 U. S. 393 did not apply, and held that such regulation was constitutional. In support of our conclusion we cited many cases involving the reasonableness of regulations in the use of land, which

cases involved the question of the possible violation of the due process clause of the Federal Constitution. We, therefore, held that in our opinion such a regulation of loam removal did not violate the Federal Constitution.

FRED T. FIELD
Chief Justice, Supreme Judicial Court.

I, Walter F. Frederick, Clerk, Supreme Judicial Court of Massachusetts, hereby certify that the above certificate was prepared and signed by Fred T. Field, Chief Justice of said Court.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court this eleventh day of July in the year of our Lord one thousand nine hundred forty-five.

(Seal) WALTER F. FREDERICK"

Statutes Involved.

The pertinent provisions of the statute involved in this case, which authorized cities and towns to pass zoning by-laws, is Massachusetts General Laws (Ter. Ed.) c. 40, §§ 25, 26 and 27, as set forth in appendix, *infra*, pp. 22-25. The zoning by-law involved, so far as material to the present controversy, is contained in the Record at pp. 3-4.

Jurisdiction.

The opinion of the Supreme Judicial Court was entered on May 7, 1945 (Rec. p. 13). The final decree in the Middlesex Superior Court was entered June 11, 1945 (Rec.

p. 20). The jurisdiction of this court is invoked under Judicial Code, § 237, as amended, 28 U.S.C. § 344(b).

Question Presented.

Briefly stated, the question presented is whether the Massachusetts Legislature in delegating to cities and towns the right to pass by-laws regulating the use of land could, without violating the 14th Amendment to the Federal Constitution, authorize a regulation of the use of land solely for aesthetic reasons.

Reasons Relied on for Allowance of Writ.

The petitioners respectfully contend that the writ of certiorari should be granted to review and reverse the decree of the Middlesex Superior Court for the following reasons:

1. That the Supreme Judicial Court of Massachusetts committed error in ordering a decree to be entered restraining your petitioners from removing the topsoil or loam from their land because—

(*a*) The Massachusetts Legislature had no right to and could not delegate to cities and towns the right to pass zoning by-laws which could be construed to prohibit the owner of land from removing topsoil or loam therefrom.

(*b*) A zoning by-law which is interpreted to prohibit such removal of loam or topsoil violates, by such interpretation, your petitioners' right to their property as guaranteed by the 14th Amendment to the Federal Constitution.

2. That the Supreme Judicial Court of Massachusetts has decided an important question involving the constitutional right of the owner of land to remove the loam or topsoil therefrom for sale or otherwise.

3. That the decision of the Supreme Judicial Court of Massachusetts on this question is apparently in conflict with the decisions of this Honorable Court in the case of *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, and the case of *Village of Terrace Park* v. *Errett,* 12 Fed. (2d) 240, certiorari denied, 273 U.S. 710, as well as in conflict with decisions of many other federal and state courts.

4. That the constitutional right of a landowner to remove loam and topsoil from his premises is one which is constantly arising, as evidenced by the many cases involving the question.

5. That the constitutional question involved in this case, being one of general and continuing interest and of nationwide importance, should now be finally decided and determined by this Honorable Court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Superior Court in and for the County of Middlesex, Massachusetts, demanding that court to certify and to send to this court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 13195 Equity, *Town of Burlington* v. *Herbert O. Dunn et al.,* and that the decree of the Superior Court in and for the County of Middlesex, Massachusetts, entered in accordance with the rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts, may be reversed by this Honorable Court and that the bill may be dismissed

and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

JOHN H. DEVINE,
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Of Counsel:
DEVINE, YORK & VOLPE,
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